No. 85-854

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRANK RUDOLPH ESPOSITO and
RICHARD PIEKARSKI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. (A) Is the Seventh Circuit's holding, affirming convictions on Travel Act counts although the counts "were defective in failing to charge an essential element of the offense,"[1] in conflict with the holding of the Third Circuit in *United States v. Wander,* 601 F.2d 1251 (3 Cir. 1979), reversing Travel Act convictions for failure to charge the same essential element that was omitted from the counts in petitioners' case?[2]

(B) Should the Third Circuit's disposition of the issue (absent any incorporation by reference, the defective counts cannot support conviction) rather than that of the Seventh Circuit (inclusion in other counts of the element missing from the Travel Act counts renders an admittedly defective count capable of supporting a conviction although no explicit incorporation by reference is made) be the law of the land?

2. Is there a fatal variance between the allegations of indictment and the proof, which violates petitioners' Fifth Amendment rights as set out in this Court's holding in *Stirone v. United States,* 361 U.S. 212 (1960), in either or both of the following respects:

> (i) the object of the attempted extortion was alleged to be 50% of the profits from operation of "game and amusement" machines[3] or "vending and amusement"[4] machines, while the proof showed an attempt to obtain 50% of gambling profits only, from the operation of

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[1] The Travel Act, 18 U.S.C. 1952, is set out at p. 2, *infra.*

[2] Opinion, App. A, p. 10. Omitted from each Travel Act count is an allegation that petitioners attempted to extort money after each interstate travel. App. A, pp. 9-10.

[3] Counts 1, 2, 3, 7, 8, 11 and 12 use the phrase "game and amusement machines."

[4] Count 5 uses the phrase "vending and amusement machines."

gambling machines as defined by an Indiana statute which excludes such machines from the category of "amusement devices";[5]

(ii) the indictment alleged that the business against which the extortion was attempted was Timothy Janowski d/b/a Geno's Vending, while the proof showed that the only business from which money was sought was a business entity (Blackbeard's Arcade) unrelated to Geno's Vending?

3. Does the Seventh Circuit's holding—that spoliation applies only to a party and not to a witness who is not a party—violate petitioners' constitutional rights to a fair trial and to compulsory process, by depriving them of the presumption that "everything is construed against a despoiler," under the facts of this case, where the alleged victim destroyed and defaced documents sought by the defendants to further their position that the target of the extortion was not the target set forth in the indictment (see Question 2 above)?[6]

PARTIES INVOLVED

Petitioners, Frank Rudolph Esposito and Richard Piekarski, were defendants in the District Court for the Northern District of Indiana and appellants in the Court of Appeals for the Seventh Circuit. Respondent, United States of America, was plaintiff in both forums.

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[5] Ind. Code Ann. 35-45-5-1 (Burns 1985). See App. A, p. 2.

[6] Based on Janowsky's admitted destruction of evidence after being served with a subpoena, petitioners moved to dismiss the indictment, and, subsequently, for an instruction that a witness's intentional destruction of evidence expected to support his testimony, gives rise to a presumption that the evidence, if available, would contradict and rebut the despoiler's testimony. See App. A, pp. 4-5. The Seventh Circuit found no error in the trial court's refusal to dismiss the indictment or in its refusal to give the instruction.

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Reasons for Granting the Writ:

1(A). The decision below—that convictions may be affirmed even though the Travel Act counts "were defective in failing to charge an essential element of the offense," (App. A, p. 10)—conflicts with that of the Third Circuit in *United States v. Wander*, 601 F.2d 1251 (3 Cir. 1979), reversing Travel Act convictions for failure to charge the same essential element that was omitted from the Travel Act counts in petitioners' case.

(B). The Third Circuit's disposition of the issue (that absent any incorporation by reference into the Travel Act counts of any other allegations from the conspiracy count of the indictment, failure of the Travel Act counts to include an allegation of any subsequent act in furtherance of the unlawful activity renders those counts defective, so that no conviction thereon may stand), rather than the Seventh Circuit's position (that inclusion in other counts of the indictment of the element missing from the Travel Act counts

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rendered the admittedly defective Travel Act counts capable of supporting convictions, even though there was no incorporation by reference within the Travel Act counts), should be adopted as the law of the land 9

2. The fatal variance between the indictment and the proof with respect to (i) the object of the alleged extortion [profits from amusement machines alleged, profits from gambling devices proved], and/or (ii) the alleged victim [Geno's Vending alleged; Blackbeard's Arcade proved], violates petitioners' Fifth Amendment constitutional right to indictment. The Seventh Circuit's decision conflicts with this Court's holding in *Stirone v. United States*, 361 U.S. 212 (1960), forbidding conviction upon a theory other than that charged by the grand jury..... 12

3. The Seventh Circuit's holding that spoliation applies only to a party, not to a witness who is not a party, violates petitioners' constitutional rights to a fair trial and to compulsory process by depriving them of the natural presumption that "everything is construed against a despoiler," where Janowsky, the person whose business was allegedly the victim of the alleged extortion, destroyed and defaced evidence sought by petitioners via subpoena in furtherance of their position that there was a fatal variance between the indictment and the proof (see Point 2).

The Seventh Circuit's limitation of the doctrine of spoliation so as to prevent its appli-

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Frank Rudolph Esposito and Richard Piekarski (hereafter, defendants), pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, affirming their convictions and sentences for violations of the Hobbs Act (18 U.S.C. 1951) and the Travel Act (18 U.S.C. 1952).

Judgment and Opinion Below

The opinion of the Court of Appeals for the Seventh Circuit, not yet published, Nos. 83-3233, 84-1126 and 84-1612, is set out as Appendix A.

Jurisdictional Statement

On August 22, 1985, the Court of Appeals for the Seventh Circuit filed its Opinion herein. (App. A) Defendants' timely Petition for Rehearing was denied on September 18, 1985. (App. B) This petition to review the judgment of a federal court of appeals is timely filed within 60 days after denial of petition for rehearing. Jurisdiction is invoked under 28 U.S.C. 1254(1) and Rules 20.1 and 20.4 of this Court.

Constitutional Provisions and Statute Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."

The Travel Act, 18 U.S.C. 1952, provides as follows:

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
> (2) commit any crime of violence to further any unlawful activity; or
> (3) facilitate promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in the subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

STATEMENT OF THE CASE

Nature of the Case

Defendants were charged in twelve counts as a result of transactions with Timothy Janowsky in and around Merrillville, Indiana, in April, 1983. The indictment charged as follows: Count 1 charged all four defendants[7] with a conspiracy unlawfully to affect commerce by extortion, in violation of 18 U.S.C. 1951, the Hobbs Act. In Count 2, the four were charged with an attempt to commit extortion in violation of the Hobbs Act, on April 6, 1983. Count 3 charged the four with an attempt to commit extortion on April 8, 1983.

Count 4 charged the four with interstate travel in violation of 18 U.S.C. 1952, the Travel Act, on April 8, 1983.

Counts 5, 7 and 9 charge defendant Esposito with attempts to commit extortion on April 11, April 14, and April 18, 1983; Counts 6, 8, and 10, with unlawful interstate travel on those dates.

Count 11 charged both defendants with attempted extortion on April 19, 1983.

Count 12 charged Piekarski alone with attempted extortion April 28, 1983.

Defendants were found guilty after a jury trial.[8] The court sentenced each to 20 years imprisonment on each of the Hobbs Act counts, sentences to run concurrently, and to 5 years on the Travel Act counts, to run concurrently with each other, but

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[7] Gary Novak and Ronald Figurski (charged with defendants in Counts 1, 2, 3 and 4) were acquitted by the jury.

[8] *I.e.*, Defendant Esposito was convicted of seven violations of the Hobbs Act (Counts 1, 2, 3, 5, 7, 9 and 11), and four violations of the Travel Act (Counts 4, 6, 8 and 10); defendant Piekarski was convicted of five violations of the Hobbs Act (Counts 1, 2, 3, 11 and 12), and one violation of the Travel Act (Count 4).

consecutively to the 20-year terms, for an aggregate sentence of 25 years as to each defendant.

The Court of Appeals for the Seventh Circuit affirmed, (App. A), and denied rehearing. (App. B)

Jurisdiction of Trial Court [per Rule 21.1(i)]

Jurisdiction in the court of first instance is based upon 18 U.S.C. 3231, which provides in part that "The District Courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." Defendants were charged with having committed offenses against laws of the United States, to wit, 18 U.S.C. 1951 & 1952.

Statement of Facts

As stated by the Seventh Circuit:

> "There was ample evidence that defendants attempted extortion of money from Timothy Janowsky who did business in Indiana and that Janowsky made purchases in interstate commerce. There was ample evidence that each defendant travelled from Illinois to Indiana with the intent to extort." (App. A, pp. 1-2)

Specific facts pertaining to each of the Issues raised in this Petition are as follows:

Issue 1—Insufficiency of Travel Act Counts to Allege Offense

It is undisputed that the Travel Act counts, 4, 6, 8 and 10, fail to charge an essential element of the offense. (App. A, p. 10) Although there was no incorporation by reference in the indictment, the Court of Appeals found that "the missing elements of attempts to extort occurring after the interstate travel were included in other counts in the same indictment," (App. A, p. 11), and therefore affirmed the Travel Act convictions despite finding that the counts "were defective in failing to charge an essential element of the offense." (App. A, p. 10) Details of the statutory elements of the offense, (see 18

U.S.C. 1952, set out at p. 2, *supra)*, and of the indictment, are summarized in the Seventh Circuit's opinion, App. A, pp. 9-11.

Issue 2—Fatal Variance Between Indictment and Proof

(i) The indictment charged attempted extortion of 50% of the profits from the operation of "game and amusement" machines (Counts 1, 2, 3, 7, 9, 11, 12), or "vending and amusement" machines. (Count 5) However, the evidence showed, if anything, an attempt to extort 50% of the profits from the operation of machines that were not vending, game, or amusement machines; they were gambling machines, as defined by an Indiana statute (Ind. Code Ann. 35-45-5-1), which excepts gambling devices from the category of devices defined as amusement devices. The evidence demonstrated that defendants' target was 50% of gambling profits, only; that they did not intend to reach profits from vending, juke-boxes, pinball, Pac-man, and the like. (See G. Ex. 32-A, p. 6)[9] Janowsky understood that defendants sought only monies from profits from gambling machines—poker, "dwarfs," horse racing—all of which operated on a similar principle, (whereby player "wins" are recorded on a separate meter, in addition to a meter showing number of times machine is played). (V, 102) An amusement machine, such as Pac-man, records only number of plays, not customer "wins." (V, 106)

(ii) The indictment charged that the alleged "victim"—that is, the business against which extortion was attempted—was "Timothy Janowsky, d/b/a Geno's Vending." However, the proof showed that the only business from which

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[9] References to Government Exhibits are to taped conversations, transcribed, containing the voices of one or both defendants, and Janowsky, who was "wired" with a body recorder by FBI agents. (See IV, 50.)

Seven volumes of Transcript of Proceedings are separately (not consecutively) paginated; they are referred to hereafter by volume (I through VII) and page.

money was sought, was a business entity (Blackbeard's Arcade), unrelated to Geno's Vending. As demonstrated in 2(i) above, only gambling profits were intended to be reached by defendants' attempted extortion—and, per the testimony of Janowsky himself, the profits from all gambling devices with which he dealt were segregated from the Geno's Vending business, and instead were channeled into accounts of Blackbeard's Arcade, a separate business entity (game-room) operated by Janowsky in Crown Point, Indiana. (VI, 23; V, 126; V, 201; V, 194; V, 145; V, 149; VI, 13-14) The bookkeeper who kept Janowsky's books for Geno's Vending testified that she did not keep any books or records from any poker machines, only for game and vending machines, while Janowsky's wife kept those (poker machine) records. (II, 172-75) The evidence demonstrated that Geno's Vending had no profits from any gambling machines, and that the only business entity into which profits from such machines went, was Blackbeard's Arcade.[10]

Issue 3—Spoliation

Per Janowsky's testimony: He started to destroy his business records as soon as he got a defense subpoena for their

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[10] Defendant's claim that spoliation of Janowsky's business records deprived them of a fair trial is based on the reasonable supposition that the destroyed records would have bolstered their defense theory that Blackbeard's Arcade and Geno's Vending are two separate business entities, with Geno's utilizing devices which are legal in Indiana, and Blackbeard's, only gambling devices illegal under Indiana law. The unavailable records of Janowsky, which (presumably) would have reflected, *inter alia*, the gambling nature of the machines whose profits went into Blackbeard's, reasonably would therefore have supported either of defendants' two theories of variance (nature of machines, the profits from which were the object of the alleged extortion; and identity of business entity alleged to be the "victim").

Moreover, see fn. 16, p. 13, *infra*.

production. (V, 124-25) Janowsky feared defendants would obtain his poker machine records, (V, 127), containing his customer list, (V, 147-48), so he ran home and burned his records, (V, 173), even those which did not indicate the customer's name, (V, 131), and including records which showed receipts and disbursements. (III, 30, 62)

In destroying his records, Janowsky knew that his acts would deprive defendants of evidence, (III, 35-36), and he understood the impropriety of concealing evidence. (V, 80)

The records he burned related to his poker machines. (III, 8) He testified that he had approximately 40 poker machines, (III, 8), and that he had about 20 poker machines. (V, 149) He could not testify to the number of his poker machines because he had burned the records. (V, 129) At another point in his testimony, Janowsky stated he had approximately 200 machines, of which 110 (50 vending machines and 60 game machines, approximately) were not poker machines. (V, 133-34) Some 75% of his business profit came from gambling machines. (V, 194) The records that he burned would have shown the money taken in at each poker machine location. (V, 196) Had he not destroyed the records, he probably could tell how much profit was produced from the different kinds of machines he had. (III, 46-47)

The records were destroyed after Janowsky met with the FBI; that is, at a time when, and not before, he considered himself and the FBI to be in "partnership," (IV, 64; V, 80; VI, 8), with respect to his assisting their efforts to make out a case against defendants. (VI, 35)

Of the nature of the destruction itself: He simply burned the poker machine records, (V, 127); he said these records would "tend to establish" the truth of his testimony, but could not be so used because he "touched a match to them." (V, 129-30) As to checks and bank records, he blacked out some of his checks and bank records with the intent of concealing their

content. (V, 111-13) He deleted portions of others, using a razor blade, again intending to "hide something," (V, 114), and knowing his acts would deprive defendants of evidence (III, 35-36), and with knowledge of the impropriety of his acts. (V, 80)

Based on Janowsky's destruction of evidence sought by defense subpoena, defendants moved to dismiss the indictment, and, alternatively, for an instruction respecting spoliation. The District Court denied both motions, and the Seventh Circuit found no error in its rulings (refusing to dismiss the indictment, and refusing the instruction). (App. A, pp. 4-5)

REASONS FOR GRANTING THE WRIT

1.

A. The decision below—that convictions may be affirmed even though the Travel Act counts "were defective in failing to charge an essential element of the offense," (App. A, p. 10)—conflicts with that of the Third Circuit in *United States v. Wander*, 601 F.2d 1251 (3 Cir. 1979), reversing Travel Act convictions for failure to charge the same essential element that was omitted from the Travel Act counts in petitioners' case.

B. The Third Circuit's disposition of the issue (that absent any incorporation by reference into the Travel Act counts of any other allegations from the conspiracy count of the indictment, failure of the Travel Act counts to include an allegation of any subsequent act in furtherance of the unlawful activity renders those counts defective, so that no conviction thereon may stand), rather than the Seventh Circuit's position (that inclusion in other counts of the indictment of the element missing from the Travel Act counts rendered the admittedly defective Travel Act counts capable of supporting convictions, even though there was no incorporation by reference within the Travel Act counts), should be adopted as the law of the land.

In an Opinion that emasculates the constitutionally-based requirement that each count of an indictment must charge each and every essential element of the offense,[11] the Seventh Circuit, in direct conflict with the Third Circuit's holding in

[11]As the government is quick to point out in other contexts, the various counts of an indictment are severable, and each is to be treated as a separate indictment—unless, of course, there is explicit incorporation by reference. Other than the anomalous holding of the Seventh Circuit at bar, cases are legion—including the Seventh Circuit—that "Each count must stand on its own, and cannot depend for its validity on the allegations of any other count not specifically incorporated." *United States v. Fulcher*, 626 F.2d 985, 988 (D.C. Cir. 1980), citing *United States v. Huff*, 512 F.2d 66, 69 (5 Cir. 1975); *United States v. Gordon*, 253 F.2d 177, 180 (7 Cir. 1958); *United States v. Pearce*, 275 F.2d 318 (7 Cir. 1960).

United States v. Wander, 601 F.2d 1251 (3 Cir. 1979), has affirmed defendants' convictions for violations of the Travel Act upon counts that "were defective in failing to charge an essential element of the offense," (App. A, p. 10), on the ground that the missing elements were alleged in other counts of the same indictment, although none of the Travel Act counts purported to incorporate by reference, any allegations of any other counts. (App. A, p. 11) Certiorari should be granted to allow this Court to resolve the conflict, to insure uniformity throughout the nation on this serious question of constitutional proportion.

Each count in an indictment is regarded as if it was a separate indictment. *Dunn v. United States*, 284 U.S. 390, 393 (1932); *United States v. Fulcher*, 626 F.2d 985, 988 (D.C. Cir. 1980); see fn. 11, p. 9, *supra*. The instant decision, by purporting to remedy the admitted defect via allegations in other counts not expressly incorporated by reference, conflicts with all the above-cited decisions,[12] in addition to the specific conflict with *Wander, supra*.

The Elements of the Travel Act Offense

The Travel Act counts, (4, 6, 8 & 10), fail to charge an essential element of the Travel Act offense;[13] nor are the missing allegations incorporated by reference from any other portion(s) of the indictment. The statute is set out at p. 2, *supra*. As pertinent to the case at bar, the elements of the

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[12] See also *Walker v. United States*, 176 F.2d 968, 798 (9 Cir. 1949):

> "[E]ach count in an indictment is regarded as if it were a separate indictment and must be sufficient in itself. Therefore, it must stand or fall upon its own allegations without reference to other counts not expressly incorporated by reference." (reversing as to counts which did not charge a crime)

[13] The Court of Appeals recognized that the Travel Act counts "were defective in failing to charge an essential element of the offense." (App. A, p. 10)

offense are: (1) travel in interstate commerce (Illinois to Indiana), (2) with intent to carry on the unlawful activity of extortion, and (3) an attempt, after the interstate travel, to extort money. (App. A, p. 9) Each of the Travel Act counts at bar fails to allege the element designated (3) above. (App. A, pp. 9-10) It is undisputed that a post-travel overt act in furtherance of the unlawful activity is an essential element of the Travel Act offense created by 18 U.S.C. 1952. *United States v. Wander, supra,* 601 F.2d at 1258-59; *United States v. Zemater,* 501 F.2d 540, 543-44 (7 Cir. 1974); *United States v. Tavelman,* 650 F.2d 1133, 1138 (9 Cir. 1981).

Conflicting Opinion from Third Circuit

In *United States v. Wander, supra,* which conflicts with the instant decision, the Third Circuit confronted the same issue raised at bar. In holding appellants could not stand convicted upon Travel Act counts which failed to allege the same third element of the Act (*i.e.,* a post-travel overt act in furtherance of the unlawful activity), the Court reversed those convictions and ordered those counts dismissed, noting that no portion of Count 1 (a conspiracy count) had been incorporated by reference.

In the case at bar, Count 1 alleged a Hobbs Act conspiracy. Nothing in the Travel Act counts purports to incorporate any of its allegations, or any of the other Hobbs Act substantive offense allegations.

The Wander Position Should Be Adopted By This Court.

The Third Circuit's position in *Wander, supra,* which refuses to read into a defective count, allegations of another count of the same indictment not explicitly incorporated by reference, rather than that of the Seventh, should be adopted by this Court as the law of the land; for the *Wander* position is consistent with the constitutionally-compelled rule that absent express incorporation by reference, the counts of an indictment

must stand or fall independently. (See fns. 11 & 12, pp. 9-10, *supra*, and accompanying text.) What the Seventh Circuit has done in this case, is directly contrary to the District of Columbia Circuit's holding in *Fulcher, supra,*[14] that "The false pretenses counts cannot absorb by osmosis the allegations of the mail fraud count." 626 F.2d at 988. The Seventh Circuit has caused the Travel Act counts to "absorb by osmosis the allegations of" other counts of the indictment.

* * *

To resolve the conflict with *Wander,* and with the other decisions above cited, certiorari should be allowed.

2.

The fatal variance between the indictment and the proof with respect to (i) the object of the alleged extortion [profits from amusement machines alleged, profits from gambling devices proved], violates petitioners' Fifth Amendment constitutional right to indictment. The Seventh Circuit's decision conflicts with this Court's holding in *Stirone v. United States,* 361 U.S. 212 (1960), forbidding conviction upon a theory other than that charged by the grand jury.

Despite the fact that the government's theory at trial[15]—as framed by the indictment—was that Timothy Janowsky, d/b/a Geno's Arcade, was a vendor of merchandise, employing coin operated machines placed in business premises of others, and that he similarly so emplaced coin operated electronic game and amusement machines; and each allegation involved that defendants attempted to extort from Janowsky, d/b/a Geno's

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[14] In *Fulcher, supra,* the reviewing court reversed convictions upon defective false pretenses counts, refusing to read into them language contained in a mail fraud count, absent incorporation by reference.

[15] Of course, the government may not take a position on appeal at odds with that taken below. See, *e.g., Giordanello v. United States,* 357 U.S. 480, 488 (1958); *Pearson v. United States,* 192 F.2d 681, 694 (6 Cir. 1951).

Vending, 50% of the profits from the vending machines and vended merchandise, home and amusement machines (which, it was alleged, were obtained by Janowsky, d/b/a Geno's Vending, in interstate commerce), the evidence demonstrated that the profits (from the machines), 50% of which was sought by the defendants, were profits from gambling devices, not vending, game or amusement machines, and that Geno's Vending did no business in such gambling machines; profits from these were treated by Janowsky as having no connection with Geno's, but rather, went through a separate business entity he operated, Bluebeard's Arcade.[16] (See pertinent evidentiary details and record references set out at pp. 5-6, *supra*, within the Statement of Facts.)

The Seventh Circuit's affirmance despite the two-pronged variance was based on (i) its refusal to perceive a significant difference between gambling machines and vending, game or amusement machines—though such difference is clearly delineated by the Indiana legislature; and (ii) its notion that:

> "This distinction [that defendants seek to draw] between Janowsky and the businesses he conducted is insignificant for present purposes." (App. A, pp. 3-4)

The Seventh Circuit's affirmance, despite the clear variances with respect both to the object of the extortion (*i.e.*, proceeds from illegal gambling devices, vs. from legitimate amusement, game and vending machines), and to the alleged "victim" business entity, flies in the face of constitutional precedent epitomized by this Court's holding in *Stirone v. United States*, 361 U.S. 212 (1960), forbidding conviction upon a theory other than that charged by the grand jury. To permit the convictions to stand in this case despite the double variances, amounts to allowing amendment of the indictment

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[16] While there was proof that Geno's Vending did business in interstate commerce, there was no comparable evidence respecting Bluebeard's Arcade.

—which is constitutionally forbidden. See, *e.g.*, *Stirone*, *supra*, *Ex parte Bain*, 121 U.S. 1 (1887); *Russell v. United States*, 369 U.S. 749, 770 (1962); *accord*, *Carney v. United States*, 163 F.2d 784, 88-90 (9 Cir. 1949). In *Stirone*, this Court reiterated the rule that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him," 361 U.S. at 217, stating:

> "The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of citizens acting independently of either prosecuting attorney or judge." *Id.* at 218.

Neither rationalization offered by the Seventh Circuit, (App. A, pp. 3-4), provides a legitimate basis to affirm, despite the variances.

Considering the clear departure of the evidence from the charges with respect to each of two major aspects of the government's case, affirmance at bar conflicts with *Stirone*, and with the principles of all the decisions cited above. Under these circumstances, defendants' convictions on all counts violate their Fifth Amendment right to grand jury indictment.

Certiorari should therefore be allowed.

3.

The Seventh Circuit's holding that spoliation applies only to a party, not to a witness who is not a party, violates petitioners' constitutional rights to a fair trial and to compulsory process by depriving them of the natural presumption that "everything is construed against a despoiler," where Janowsky, the person whose business was allegedly the victim of the alleged extortion, destroyed and defaced evidence sought by petitioner v.. subpoena in furtherance of their position that there was a fatal variance between the indictment and the proof (see Point 2).

The Seventh Circuit's limitation of the doctrine of spoliation so as to prevent its application where spoliation by a prosecution witness in a criminal case, after being served with a defense subpoena calling for such evidence, was without complicity by the prosecution, thwarts petitioners' Sixth Amendment right to compulsory process.

The facts, which clearly set out that Janowsky systematically destroyed and defaced business records after being served with a defense subpoena calling for their production, are set out within the Statement of Facts, pp. 6-8, *supra*. Moreover, it is evident from the nature of the records he destroyed, considered together with Janowsky's trial testimony, (see pp. 7-8, *supra*), that these records, had they not been defaced and destroyed, might well have supported defendants' theory of the case, respecting the two-fold variance as argued in Point 2, above. (See fn. 10, p. 6, *supra*.)

Without deciding whether defendants were harmed by the spoliation, the Seventh Circuit simply concluded that "Janowsky's destruction of evidence did not entitle defendants to dismissal nor to the instruction requested,"[17] (App. A, p. 5),

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[17] Defendants' motions to dismiss the indictment due to the spoliation, and for an instruction as to the presumption to be drawn against a witness who has destroyed, altered or defaced evidence, (see fn. 6, p. ii, *supra*), were denied. The Seventh Circuit found no error in these rulings. (App. A, pp. 4-5)

because the doctrine that "Everything is construed against a despoiler,"[18] is limited to parties to an action, thus necessarily excluding the situation as here, where the despoiler is a prosecution witness who acted without prosecutorial complicity.

Respecting the doctrine of spoliation, this Court has spoken in such decisions as *The Bermuda,* 70 U.S. 514, 550 (1865); *Hanson v. Eustace's Lessees,* 43 U.S. (2 How.) 653, 708-09 (1844).

Such limitation of the doctrine here—where Janowsky admittedly had already begun working with the prosecution respecting the case against defendants, (IV, 64; V, 80; VI, 8, 35), and intentionally destroyed and defaced his business and bank records *after* receiving a defense subpoena calling for their production, (V, 124-25)—operates to deprive defendants of effective exercise of their right under the Sixth Amendment to compulsory process for favorable evidence. See *Chambers v. Mississippi,* 410 U.S. 284 (1973); *Washington v. Texas,* 388 U.S. 14 (1967).

The importance to defendant's theory of the case of the documentary evidence destroyed by Janowsky is evident from perusal of the facts set out at pp. 7-8, *supra,* delineating the differences between Geno's Vending and Blackbeard's Arcade, and between gambling devices and amusement, game or vending machines. (See also fn. 10, p. 6, *supra.*)

Considered in context with the serious issues respecting variance as raised in Point 2, *supra,* defendants were severely prejudiced by their inability to utilize the evidence admittedly destroyed by Janowsky, in bad faith, after the records were subpoenaed. Considered in this light, the spoliation issue was improperly concluded by the Seventh Circuit in a manner violative of defendants' rights to a fair trial and to compulsory process.

Certiorari should be allowed to permit this Court to speak on the spoliation issue in the context of a criminal case wherein a prosecution witness, after aligning himself with the prosecution, intentionally and in bad faith destroys evidence, thereby preventing defendants from utilizing it in support of their theory of the case.

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[18] "*Omnia praesumuntur contra spoliatorem.*" BLACK'S LAW DICTIONARY 1238 (Rev. 4th ed. 1968).

CONCLUSION

For any or all of the foregoing reasons, certiorari should be allowed. And, in considering the merits of each of the issues—involving serious, constitutional questions of pressing importance throughout the judicial system—we submit Your Honors should take heed of the caveat, so well stated almost a century ago, that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States,* 116 U.S. 616, 635 (1886).

Respectfully submitted,

GERALD M. WERKSMAN
FRANK W. OLIVER
Attorneys for Petitioners

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 83-3233, 84-1126 and 84-1612

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANK RUDOLPH ESPOSITO and RICHARD PIEKARSKI

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division,
No. 83 CR 28, James T. Moody, *Judge*.

ARGUED JANUARY 15, 1985—DECIDED AUGUST 22, 1985

Before CUMMINGS, *Chief Judge*, ESCHBACH, *Circuit Judge*, and FAIRCHILD, *Senior Circuit Judge*.

FAIRCHILD, *Senior Circuit Judge*. Defendant Piekarski was convicted of five violations of the Hobbs Act (18 U.S.C. § 1951) and one violation of the Travel Act (18 U.S.C. § 1952). Defendant Esposito was convicted of seven violations of the Hobbs Act and four violations of the Travel Act. Each was sentenced to twenty years imprisonment on each of the Hobbs Act counts, with the sentences to run concurrently, and to five years on the Travel Act counts, to run concurrently with each other, but consecutively to the twenty-year terms. They appeal.

There was ample evidence that defendants attempted extortion of money from Timothy Janowsky who did business in Indiana and that Janowsky made purchases in interstate commerce. There was ample evidence that each

defendant travelled from Illinois to Indiana with the intent to extort. Their arguments on appeal rest on other facts of the indictment and trial which will be described in the course of discussion of the respective points.

I. VARIANCE

Each Hobbs Act count alleged that Janowsky did business as Geno's Vending in Merrillville, Indiana, a business engaged primarily in supply and servicing, via delivery vehicles, coin-operated vending machines and electronic amusement machines in the Northwest Indiana area; that the vehicles, machines, and associated equipment and supplies would move into Indiana for sale to and use by Geno's Vending; that defendants attempted to affect the movement of these machines and vehicles by extortion; that they attempted to obtain from Janowsky, doing business as Geno's Vending, 50% of the profit realized by Janowsky, doing business as Geno's Vending, derived from electronic game and amusement machines leased from or operated by Geno's Vending.

The claim of variance arises in part from the evidence that the extortionate demands were for 50% of the profits from electronic poker machines used for gambling, whereas the indictment charges a demand for 50% of the profit derived from electronic game and amusement machines. Janowsky also supplied other types of coin-operated machines, and derived proceeds which were not included in the extortionate demands.

There was testimony that electronic poker machines are amusement machines. Giving the words their ordinary meanings, an electronic poker machine appears to be a type of electronic game or amusement machine even though the poker machine has features which make it more useful than others as a gambling device. Defendants argue that the poker machine is not an amusement device because under an Indiana statute, Ind. Code Ann. 35-45-5-1 (Burns 1985), an electronic poker machine would be

classified as a gambling device and distinguished from "pinball machines and similar amusement devices." The Government tells us that whether an electronic poker machine is a *per se* gambling device under the cited statute is an unsettled controversy in Indiana. In any event, the Indiana statute does not control the definitions for the purpose of the meaning of the indictment in the instant case.

The remaining claim of variance arises from the evidence that Janowsky not only owned and operated an establishment known as Geno's Vending in Merrillville, as alleged in the indictment, but also Blackbeard's Arcade in Crown Point. The poker machines and other goods were purchased in interstate commerce in the name of Geno's Vending. The Government asserts that:

> The evidence at trial showed that the electronic poker machines were purchased by Geno's Vending, shipped to Geno's Vending, paid for by Geno's Vending, and the profits derived therefrom were considered profits of Geno's Vending. The proof at trial was that the receipts from all gaming machines (video games and electronic poker machines) were combined and considered profits of Geno's Vending.

Appellee's Br. at 21-22. Defendants point to evidence that proceeds from the electronic poker machines, used as gambling devices, were not handled and recorded in the ordinary course at the Geno's Vending establishment. They were taken to Janowsky's home, and counted and recorded by him and his wife. Some, perhaps, were included as receipts of Blackbeard's. Defendants appear to consider Geno's Vending as an entity, Blackbeard's Arcade as a different entity, and each as separate from Janowsky, the individual who owned and operated them. They argue that the indictment alleged Geno's Vending was the "victim" of the attempted extortion, but the proof showed a different "victim," Janowsky, who did not purchase goods in interstate commerce. This distinction between Janowsky and the businesses he conducted is

insignificant for present purposes. If the extortion had been successful, Janowsky would have given up substantial sums of money, and his capacity to purchase goods in interstate commerce would have been curtailed, whether or not the flow of money had nominally gone through his Geno's Vending establishment, and whether or not the goods purchased in interstate commerce would continue to be purchased in the name of Geno's Vending. Any variance did not affect an essential element of the offense nor impair the substantial rights of either defendant. *United States v. Cina*, 699 F.2d 853, 856-58 (7th Cir. 1983). Defendants had adequate notice of the charges and their protection against second prosecution for the same offense was not impaired.

II. SPOLIATION

In furtherance of defendants' theory that the funds to be extorted did not belong to Geno's Vending they subpoenaed Janowsky to produce the records of Geno's Vending. He was unable to produce the poker machine records, and testified that he had burned them after he was first approached by defendants. Defendants had demanded a list of the locations of the electronic poker machines. After receiving the subpoena he had defaced some of his checks and bank records, allegedly because he did not want defendants to get a list of his accounts and account numbers.

Defendants' motion to dismiss based on this destruction of evidence was denied. They also requested an instruction that:

> When a *witness* is shown *intentionally* to have destroyed, altered or defaced evidence, which, were it produced in its original undamaged form would be expected to support his testimony, his destruction or alteration thereof gives rise to a *presumption* that the evidence, were it available in its undespoiled form, would contradict and rebut the testimony of the

witness who despoiled it.

(Emphasis added.)

The district judge refused the intruction, ruling that the destroyed records were irrelevant, apparently upon reasoning, similar to ours in finding no variance, that it made no significant difference whether the poker machine proceeds were accounted for in the ordinary course of bookkeeping of Geno's Vending, or separately received and recorded by Janowsky.

In any event, Janowsky's destruction of evidence did not entitle defendants to dismissal nor to the instruction requested.

In brief, the spoliation doctrine relied on applies to a party, not a witness who is not a party, and there is no suggestion here that the Government or its agents participated in Janowsky's destruction nor condoned it. In addition to an intentional destruction, bad faith must be shown. And if the doctrine applied, it would give rise to an inference, not a presumption.

As Wigmore states the spoliation doctrine,

> [A] party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.

2 J. WIGMORE, EVIDENCE § 278 (Chadbourn rev. 1979) p. 133 (emphasis omitted). This court has noted that the spoliation doctrine applies if two conditions are met. *S.C. Johnson & Son v. Louisville & Nashville R. Co.*, 695 F.2d 258 (7th Cir. 1982). A party must destroy evidence, and its destruction must have been in bad faith. *Id. See Coates v. EEOC*, 756 F.2d 524, 550-51 (7th Cir. 1985).

III. EFFECT OF MIXED LEGAL-ILLEGAL BUSINESS

Appellants contend that the district court erred in denying their motion to dismiss which alleged that Janowsky's business was not protected under the Hobbs Act, 18 U.S.C. § 1951, because the evidence established that he was involved in some illegal activities. This circuit has held that the Hobbs Act was not limited to wholly legitimate operations, but extends to "mixed legal-illegal business ventures." *United States v. Blakey*, 607 F.2d 779, 783 (7th Cir. 1979).

Blakey controls this case. Indeed, even if Janowsky's business had been totally illegal the Hobbs Act would apply. *United States v. Ambrose*, 740 F.2d 505, 511-12 (7th Cir. 1984); *United States v. Hanigan*, 681 F.2d 1127, 1131 (9th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983).

IV. POLTE-BURKE QUESTIONS

A. Pre-Trial Motions

Defendants employed Dennis Burke, a private investigator, to assist them in preparing their defense. Burke assigned the case to Lawrence Polte, an employee. Six weeks before trial, Polte (who may no longer have been an employee) was arrested and charged under the Hobbs Act, apparently for an attempt to extort money from Janowsky. The charge was later dismissed.

The affidavit supporting the complaint was signed by an FBI agent. It stated that on August 24, 1983 Janowsky reported to affiant that a John Smith had said he had evidence harmful to Janowsky, but could insure its disappearance for $6,000; that affiant recorded subsequent calls in which Smith repeated his assertions; that FBI agents arrested the person whom they had observed placing one of the calls. Smith turned out to be Polte.

Defendants made a motion for an evidentiary hearing concerning Sixth Amendment violations. They asserted they had had conferences with Burke concerning

plans for defense. They also sought an order requiring the Government to make available the recordings of the conversations, investigative reports concerning the incident, and any relevant information turned over by Polte.

The district court examined (*in camera*) tapes and other items produced by the Government, determined they were not material to the present case, and denied the motions. The procedure used was adequate to safeguard defendants' interests. *United States v. Wilson*, 715 F.2d 1164, 1169-70 (7th Cir.), *cert. denied*, 104 S.Ct. 434 (1983). We have listened to the tapes produced and examined the other *in camera* materials, and conclude the district court action was correct.[1]

As the record stood when the motions were denied, there was no suggestion that the Government was responsible for any intrusion into defense councils. The only information about defense strategy which came to the Government in the course of the Polte affair was that defendants were having Janowsky investigated. None of the information in the *in camera* materials was conceivably favorable or unfavorable to defendants nor likely to be even marginally useful in impeaching Janowsky as to any testimony he might give relevant to the indictment.

B. Section 2255 Motion

After appeals were taken from final judgment, defendants filed a motion seeking a hearing to determine whether they are entitled to relief under 28 U.S.C. § 2255.

On January 30, 1984, two *Chicago Sun-Times* columnists had included the following paragraph:

> PUSHERS' FUZZ-BUSTER: Dennis Burke, a former Chicago vice cop who's now a private detective, is working with narcotics agents to check out what they

[1] One 302 report indicates that one other telephone conversation was recorded, although no tape for that conversation was among those produced. Under the circumstances we are satisfied this was an inadvertence and insignificant.

> believe is a new racket—an early warning system for cocaine pushers. Burke fingers Richard Randazzo, an ex-convict with crime syndicate connections, as the perpetrator. He says informants have related that Randazzo uses radio scanning equipment to monitor law enforcement agencies. Then, says Burke, Randazzo warns certain dope pushers that they're subjects of surveillance—for a fee. One of the top investigators, a member of the joint federal and local narcotics task force, says he has heard the same report of Randazzo's activities from an informant. Burke says Randazzo recently has eased off with his capers, apparently fearing he could be busted for obstruction of justice.

Petacque, A. and Hough, H., *Waltzing Away From Condo Deal*, Chi. Sun-Times, Jan. 30, 1984 at 11, col. 2.

Defense counsel filed his affidavit concerning a conversation with Randazzo in which Randazzo said he had asked Burke whether he was working for federal or local law enforcement agencies. "Randazzo told me that Burke never gave him a satisfactory answer and that Randazzo now believes—based on what occurred—that Burke is in the employment of local and federal law enforcement agencies."

The Government filed an answer and a supporting affidavit of the Assistant United States Attorney assigned to the present case. Affiant stated that he had no contact with Burke except on one occasion in the presence of defense counsel when Burke stated that Polte was not in Burke's employment at the time of his arrest; that affiant had, after Polte's arrest, advised the agents investigating Polte not to question Burke concerning matters arising out of Burke's employment by defendants, and the agents assured affiant they had not done so.

The district court denied the motion, saying:

> A motion under § 2255 is ordinarily improper during the pendency of a direct appeal from a conviction, and this case presents no extraordinary circumstances compelling District Court review. *See United States v.*

Gordon, 634 F.2d 639 (1st Cir. 1980); *United States v. Davis*, 604 F.2d 474 (7th Cir. 1979).

We again conclude that the district court was correct. The vague newspaper report of a relationship between Burke and "narcotics agents" and the belief of Mr. Randazzo provide no basis for supposing that Burke would or did betray to the Government the defense strategy of his paying clients in this case, and the prosecutor's affidavit is a positive statement that he had no contact with Burke other than one known to the defense and that any information obtained by the Government was limited to that which came from Polte and as a result of Polte's arrest. The *in camera* materials remain as clearly immaterial as they were before.

V. DEFICIENCY IN TRAVEL ACT COUNTS

The Travel Act, 18 U.S.C. § 1952, provides as follows:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

As applied to this case, the essential elements of the offense are: (1) travel in interstate commerce (Illinois to Indiana), (2) intent to carry on the unlawful activity of extortion, and (3) an attempt after the interstate travel to extort money. Each of the Travel Act counts (IV, VI,

VIII and X) charged elements (1) and (2), but did not charge (3). The drafter of the indictment left element (3) out of these counts, inadvertently of course, because element (3) conduct was included in other counts.

Defendants did not move to dismiss the Travel Act counts, but we acknowledge that the failure of an indictment to charge an offense is subject to review and dismissal at any stage, including appeal. *United States v. Clark*, 412 F.2d 885, 888 (5th Cir. 1969); *Chappell v. United States*, 270 F.2d 274, 276 (9th Cir. 1959).

It is clear that when the indictment is read as a whole it gave defendants notice that they were charged with attempts to extort, necessarily included within attempts to affect commerce by extortion, on dates later than, as well as the same as, the dates of interstate travel.

Piekarski was charged in Count IV with interstate travel on or about April 8, 1983. Count III charged him with an attempt to affect commerce by extortion on or about April 8, 1983, and the evidence makes clear that the attempt at extortion took place after the travel. He was also charged with an attempt to affect commerce by extortion on or about April 19, 1983 (Count XI) and on or about April 28, 1983 (Count XII).

The same analysis can be made as to Esposito. He was charged with interstate travel on or about April 8 (Count IV), April 11 (Count VI), April 14 (Count VIII) and April 18 (Count X). He was charged with attempts to affect commerce by extortion on or about April 8 (Count III), April 11 (Count V), April 14 (Count VII), April 18 (Count IX) and April 19 (Count XI).

The court's instructions correctly informed the jury as to each Travel Act count that the Government had the burden of proving each of elements (1), (2) and (3) beyond a reasonable doubt.

There is no question but that Counts IV, VI, VIII and X, standing alone, were defective in failing to charge an essential element of the offense. In the context of this

indictment, however, vacating the convictions and ordering these counts dismissed would be an extreme example of technicality, unnecessary to protect the rights of the defendants. The missing elements of attempts to extort occurring after the interstate travel were included in other counts in the same indictment and must necessarily have been found beyond a reasonable doubt on the other counts.

Defendants rely on *United States v. Wander*, 601 F.2d 1251 (3rd Cir. 1979). There also was a failure to charge element (3) in Travel Act counts. The court held:

> As is readily apparent, no mention is made of a subsequent act in furtherance of the unlawful activity. Nor is any portion of Count I incorporated by reference. The failure to aver a subsequent overt act in furtherance of the unlawful activity renders Counts II through IV of the indictment defective and compels us to dismiss them.

601 F.2d at 1259 (citations omitted).

It appears that Count I in *Wander* charged conspiracy. It is not clear whether allegations in Count I would as clearly as in this case have supplied the deficiency if read with the Travel Act counts, nor whether the conviction on Count I (which was reversed for trial error) necessarily established that element (3) acts had occurred after the instances of interstate travel. In the instant case, as already indicated, the elements missing from the Travel Act counts were charged in other counts, and must have been found by the jury. We think the differences in the indictments are sufficient to distinguish *Wander*.

Reindictment and retrial on the Travel Act counts here, necessarily including proving again the attempts to extort which followed the instances of interstate travel, would be a pure waste of energy because defendants would not thereby be afforded any protection of their rights which was not afforded in the first trial.

Nos. 83-3233, 84-1126 & 84-1612

The judgments appealed from are AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—8-22-85—450

APPENDIX B

United States Court of Appeals

CHICAGO, ILLINOIS 60604

SEPTEMBER 18, 1985

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 83-3233,

vs.

84-1126 & 84-1612

FRANK RUDOLPH ESPOSITO and
RICHARD PIEKARSKI,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division

No. 83 CR 28

JAMES T. MOODY, *Judge.*

ORDER

On consideration of petition for rehearing filed in the above-entitled cause on September 3, 1985 by counsel for defendants-appellants, with all members of the panel having voted to DENY rehearing,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.